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Supreme Court of the United States

October Term, 1952

No. 3

JOHN KEDROFF and BENJAMIN FEDCHENKOFF, as Archbishop, etc.,

Appellants,

v.

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF ON REARGUMENT

PHILIP ADLER,
Attorney for Appellants.

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1. We find it difficult to deal with appellee's brief, not because it presents any irrefutable arguments, but because it makes so many self-serving assertions without support in the record. For the relevant facts we must turn to appellants' brief which, it is to be noted, appellee does not challenge in any material respect.

2. In the *Waipa* case, Theophilus transferred one of his priests from Yonkers to another parish. The priest refused to leave and the court held, and properly so, that the priest had to obey his bishop. Benjamin was not a party to the suit and made no claim to the priest or the church; Benjamin's status could not possibly have been involved therein. Appellee's assertion that in that case "the courts sustained had the authority of Theophilus, as against Benjamin, over a local church property" (its brief, p. 29), is clearly erroneous and we are confident appellee will acknowledge this. The *Yonkers* case does not have the remotest bearing on the right of the canonical archbishop

to occupy the Cathedral and a consideration thereof can serve no legitimate purpose here.

3. Appellee's discussion of the alleged "old" and "new" diocese is wholly arbitrary. The report by Benjamin in 1933 that "our North American Diocese has begun official existence" is merely a statement that the Patriarchal Church has resumed its functions here and is not an indication that the Patriarch had abandoned his authority over the diocese. On the contrary, he suspended Platon and appointed Benjamin archbishop thereof.

4. The record shows (122-123):

> "Excuse me. There is no evidence there was any pledge of loyalty. It is a question of agitation in the churches against the government.
>
> Mr. Arkush: When I say a 'pledge of loyalty' I mean that pledge which his Eminence has testified to . . .
>
> A. Loyalty is understood as refraining from politics only . . . Both in church and in the name of the Church."

Notwithstanding this, appellee repeats its unfounded claim that there was a demand that the local clergy pledge loyalty to the Soviet government. Due regard for the facts requires avoidance of such misuse of language.

5. Tikhon was imprisoned in 1923, therefore the Patriarchate is not a true religious body in 1945, says appellee (its brief, p. 30). Appellee is welcome to this kind of argument. Although it now tries to resuscitate the remains of the Renovated Church, it acknowledged on the previous argument that it "is extinct to-day" (its main brief, p. 13).

6. Appellee says: "In the absence of a formal inquiry and explicit finding by the legislature, the Court of Appeals properly resorted to presumption" (its brief, p. 29). Here is a novel principle indeed. If there is anything one desires

which is lacking in a statute, all one has to do is to supply the deficiency by presumption. Appellee applies this principle with a vengeance; it presumes the existence of anything which serves its purpose.

7. Appellee acknowledges that the legislature "determined" that the rules of the metropolitan district were to be the governing "canon law" of the Russian Church (its brief, p. 43). That is the point precisely. Under the First Amendment, the legislature has no power to "determine" or prescribe what the canon law shall be.

(a) *Watson* v. *Jones*, because it *enforced* the canon law, did not interfere in the internal affairs of the church. But the Kentucky court did interfere in the internal affairs of the church (and this Court so declared), when it *rejected* the canon law and decided the case by rules of its own, by its own views of how the church should be governed. In such a case, a civil court literally writes the canon law of the church, a task which the courts are professionally unequipped and constitutionally unauthorized to perform (13 Wall. at 728-9, 732-4). The ruling in *Watson* v. *Jones* that the canon law of a church, as pronounced by its chief authorities, is "final", is "not examinable" in, and is "binding" on the civil courts, derives from the "structure of our government" and is "founded in a broad and sound view of the relations of church and state under our system of laws" (*ibid.*, 727, 730-1).

(b) There will be a minimum of religious disputes if the courts are told to let the canon law alone—to enforce the canon law as they find it—and to make no effort to rewrite it. The rule in *Watson* v. *Jones* is thus one of economy and least action for the courts. But even if it were not, this Court cannot abdicate its function to vindicate a federal right. Basic rights "should not be curtailed because of reluctance to decide constitutional questions" (*Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 286, 321).

(c) If, for example, a civil court, by command of a statute or otherwise, were to subject St. Nicholas Cathedral to the jurisdiction of the Pope, is there any doubt that such a judgment would violate the guarantee of religious liberty and be reviewable in this Court? In our case the canon law is clear and indisputable. The appointed archbishop has the exclusive right to occupy the cathedral and to officiate there. But, in open defiance of the canon law, the judgment ejects him from the Cathedral and prohibits him from conducting religious services there. What clearer case can there be of a violation of a federal right, of a curtailment of the free exercise of religion in contravention of the First Amendment? In the face of this commanding fact all of appellee's contentions come to nothing.

8. Appellee says: "Concededly, the judgment is based on the statute; and the court did purport to pass on the federal question" (its brief, p. 46). This, of course, refutes its claim that the judgment may be sustained on state grounds. Whether the statute, as construed, is constitutional is a federal question. Appellee's pallid claim that the federal question is "unsubstantial", cannot be taken seriously. The clash of opinion in the courts below, the extraordinary result achieved, and the revolutionary theory on which it is based, show that the issue is not merely substantial but wholly unprecedented. "No other decision reaching such a result can be found in the books".

The judgment should be reversed.

Respectfully submitted,

PHILIP ADLER
Attorney for Appellants